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IN THE

Supreme Court of the United States

October Term, 1981

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, a Delaware Corporation,

Petitioner,

vs.

RAYMOND KASSEL, ROBERT RIGLER, L. STANLEY SCHOELERMAN, DONALD GARDNER, JULES BUSKER, ALLAN THOMS, BARBARA DUNN, WILLIAM McGRATH, JON McCOY, CHARLES W. LARSON, EDWARD DICKINSON, RICHARD C. TURNER, and ROBERT D. RAY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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GUILD PRINTING CO., INC. MADISON, WIS.

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ARGUMENT

I. THE ONLY ISSUE PROPERLY BEFORE THIS COURT IS THE REFUSAL OF THE COURT OF APPEALS TO GIVE A REASON FOR ITS DECISION.

A. RESPONDENTS' BRIEF VIOLATES THE RULES OF THIS COURT.

This Court granted certiorari on the single question of whether the Eighth Circuit must give a reason for denying attorneys fees. That was the only question presented in

the Petition for Certiorari. It was acceded to by Respondents[1] ("Iowa") and briefed by Petitioner ("CF").

Rule 21.1(a) of this Court states in part:

> "Only the questions set forth in the petition or fairly included therein will be considered by the Court."

Rules 34.1(a) and 34.2 of this Court further confine the parties to briefing the question presented in the Petition, though the respondent may take exception with the form of the questions.

Iowa's brief, however, lists four questions presented, only one of which is even arguably consistent with the Petition for Certiorari and Response on Certiorari.[2] The brief is inconsistent with the intent of the Rules and a workable appellate process.

B. IOWA'S BRIEF ILLUSTRATES WHY A LOWER COURT OPINION IS NECESSARY.

A lower court opinion is necessary to permit effective review of the Eighth Circuit's decision. Without an opinion, this Court cannot determine what combination of the possible factual and legal issues formed the basis of the

[1]Compare the "Question Presented" in the Petition for Certiorari and in the Response to the Petition for Certiorari.

[2]Iowa contends that there is an exception to the rule and that respondents may argue any issue that supports the decree below. That exception is well recognized, *Langnes v. Green*, 282 U.S. 531 (1931), but it cannot be applied where the basis of the appeal is the lack of any statement of reasons below. *Semble*, *Dandridge v. Williams*, 397 U.S. 471, 475 n. 6 (1969); *United States v. Ballard*, 322 U.S. 78, 88 (1944)

Adoption of Iowa's view would ensure that every appeal on the basis of a lack of opinion would become an appeal on the merits of the case, thereby begging the question of whether an opinion is needed for proper appellate review.

Eighth Circuit's decision. Neither party can adequately present the case on appeal, nor can this Court adequately review it. The Circuit Courts of Appeals, including the Eighth, require that trial courts state their reasoning when denying attorneys fees. Brief of Petitioner at 12-13. This Court has similarly required a statement of reasoning when attorneys fees are decided initially by a Court of Appeals. *Northcross v. Board of Education*, 412 U.S. 427 (1973).

Iowa contends that the basis of the Eighth Circuit's decision can easily be discerned because Iowa's brief in the Circuit Court below raised only one issue.[3] They are wrong. No brief was filed by either party prior to the Eighth Circuit's decision. The Eighth Circuit decided the issue without briefs.[4] The only briefs filed in the Eighth Circuit were short briefs later filed on the Motion to Vacate. Those subsequent briefs were obviously not a basis for the initial decision. CF requested the opportunity to file a full brief in the Motion to Vacate, but the request was denied. Appendix at 26, 29.

Iowa contends that there can be only one reason for the Eighth Circuit's denial of fees,[5] but Iowa's brief advances three different reasons for the denial: (1) §1983 does not apply to Commerce Clause cases, Brief of Respondents at 7-37; (2) the Eleventh Amendment bars awards of attor-

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[3]Brief of Respondents at 42.

[4]By letter from the Clerk, the Eighth Circuit directed CF to file a Bill of Costs. No provision was made for briefs on the Bill of Costs.

CF included attorneys fees in the Bill of Costs to avoid waiver and suggested remand to the trial court. Appendix at 19. CF did not, as Iowa suggests, choose the Court of Appeals as the forum.

[5]Brief of Respondents at 41-42.

neys fees against states, Brief of Respondents at 38-41; and (3) corporations have no right to engage in interstate commerce, Brief of Respondents at 37-38. We do not know, Iowa does not know, and this Court does not know, why the Eighth Circuit ruled as it did. Without that knowledge, effective appellate presentation is nearly impossible and effective review foreclosed.[6]

We do not suggest that all the issues presented by Iowa are trivial or obvious. The importance of some of those issues emphasizes the need for an ordered presentation of the case in the lower courts and an ordered presentation before this Court. Awarding attorneys fees in Commerce Clause cases is a matter of first impression. It should not be a matter upon which this Court acts before any lower court determinations.

C. THIS COURT SHOULD CONSIDER ONLY THE QUESTION PRESENTED.

CF urges the Court to confine itself to the question upon which certiorari was granted. Should this Court, nonetheless, decide to determine the questions raised by Iowa, the remainder of this reply brief addresses those questions.

II. THE CONSTITUTION SECURES THE RIGHT TO ENGAGE IN INTERSTATE COMMERCE FREE FROM IMPROPER STATE REGULATION.

A. THE CONSTITUTION DOES NOT CREATE RIGHTS.

Neither the Constitution nor government creates rights. Fundamental rights are "natural, essential, and inalienable."[7] One of the purposes of government is to protect

those rights. A principal purpose of the Constitution is to protect those rights from their most frequent enemy, government itself.

When the Constitution was drafted, property rights were recognized as natural and inalienable rights. The broad category of property rights included the right to engage in commerce. A number of the state constitutions adopted after the revolution recognized the right to "acquire, possess, and protect" property as natural and inalienable.[8] The Articles of Confederation specifically expressed a personal right to engage in interstate commerce:

> "...the people of each state shall have free regress and egress to and from any other state and shall enjoy therein all the privileges of trade and commerce...." ARTICLES OF CONFEDERATION, art. IV.

Justice Marshall, in the seminal decision on the Commerce Clause, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), specifically recognized an inherent natural right to engage in interstate commerce:

> "In pursuing this inquiry at the bar, it has been said, that the constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose

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[6]For instance, Iowa argues that a denial of fees on the basis of "eligibility" requires no opinion, but concedes that a denial on the basis of "entitlement" should have a statement of reasons. Brief of Respondents at 42-45. Some statement of reasoning is necessary, however, to determine which of the two bases was used for denial.

[7]MASS CONST. of 1780, art. I.

[8]See e.g., MASS. CONST. of 1780, art. I; VERMONT CONST. of 1777, Chap. 1, art. I; VA. BILL OF RIGHTS, 1776, §1; reproduced in B. POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTER, AND OTHER ORGANIC LAWS OF THE UNITED STATES, 957, 1859, 1908 (1877).

authority is acknowledged by civilized man throughout the world. This is true. The constitution found it an existing right, and gave to Congress the power to regulate it." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).

The existence of the right to engage in interstate commerce, like the existence of other rights, is not dependent on the Constitution. It is, however, protected by the Constitution.

B. The Right To Engage In Interstate Commerce Is Secured By The Constitution.

The primary threat to an individual's right to engage in interstate commerce is state government. The initial motivation for the replacement of the Articles of Confederation by the Constitution was the inadequate protection of interstate commerce from the acts of the individual states. *H.P. Hood v. Du Mond*, 336 U.S. 525, 533 (1949). Interstate commerce suffered from conflicting regulations designed by each state to obtain benefits for itself at the expense of its neighbors.[9]

The drafters of the Constitution recognized the problem to be inherent in state regulation. Accordingly, the power to regulate interstate commerce was removed from the states and placed in the federal government. Though this Court has frequently redefined the limits of what the states

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[9] "... [E]ach State would legislate according to its estimate of its own interest, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view. To do otherwise would be to sacrifice its immediate interest, without any adequate or enduring consideration; to legislate for others, and not for itself; to dispense blessings abroad, without regarding the security of those at home." J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §259 (1873).

may do, this Court has always recognized and protected an individual right to engage in interstate commerce:

> "But the statute, requiring the corporation . . . to surrender *a right and privilege secured to it by the Constitution and laws of the United States* was unconstitutional and void . . ." *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 36 (1910).
>
> "There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).
>
> "[I]n a leading case, *Oklahoma v. Kansas Natural Gas Co.*, 221 U.S. 229. . . . [t]he court held that . . . the right to engage in interstate commerce is not the gift of a state, and the state cannot regulate or restrain it." *H.P. Hood v. Du Mond*, 336 U.S. 525, 535 (1949).
>
> "[The State] imposes a direct burden on the plaintiff's right to engage in interstate business and therefore is in violation of its constitutional rights." *Buck Stove & Range Co. v. Vickers*, 226 U.S. 205, 216 (1912).
>
> "To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject." *Crutcher v. Kentucky*, 141 U.S. 47, 57 (1891).[10]

Accord, James v. Dravo Contracting Co., 302 U.S. 134, 158 (1937); *Furst v. Brewster*, 282 U.S. 493, 498 (1931);

[10]Iowa contends that corporations have no standing to assert "privileges and immunities" under art. IV, §2. Corporations, however, possess "rights." *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). As the material quoted makes clear, there is a right to engage in interstate commerce which corporations possess.

Sioux Remedy Co. v. Cope, 235 U.S. 197, 201 (1914); *Barrett v. City of New York*, 232 U.S. 14, 31 (1914); *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 260 (1911); *International Textbook Co. v. Pigg*, 217 U.S. 91, 112 (1910); *Ludwig v. Western Union Tel. Co.*, 216 U.S. 146, 160 (1910).

III. SECTION 1983 APPLIES TO VIOLATIONS OF OF THE COMMERCE CLAUSE.

A. COMMERCE CLAUSE CASES ARE WITHIN THE PLAIN LANGUAGE OF §1983.

As the cases cited *supra* make clear, this Court has repeatedly asserted that the right to engage in interstate commerce is a "right secured by the Constitution." That is precisely what is covered by 42 U.S.C. §1983:

> "Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any *rights*, privileges or immunities *secured by the Constitution* and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."[11] [Emphasis added]

A restrained approach to what constitutes a "right" and a narrow application of the words of the statute yield the result that this case is covered by §1983.

B. THIS COURT HAS NO PRECEDENT FOR DENYING §1983 COVERAGE OF THE RIGHT TO ENGAGE IN INTERSTATE COMMERCE.

Few cases have arisen in which §1983's application to the Commerce Clause has been determined.[12] Commerce

Clause cases are few in number, and several alternate jurisdictional statutes are normally applicable.[13] The recent passage of 42 U.S.C. §1988 makes the availability of §1983 an issue.[14]

Because §1983 is applicable on its face, Iowa has argued the existence of three distinctions which, Iowa contends, should exclude §1983 coverage. Precedent and constitutional theory do not support these distinctions.

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[11]In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court strongly endorsed relying on the plain language of §1983. The Court stated:

> "[T]he legislative history does not permit a definitive answer. . . . [but] the legislative history does not demonstrate that the plain language was not intended. Petitioners' arguments amount to the claim that had Congress been more careful, and had it fully thought out the relationship among the various sections, it might have acted differently. That argument, however, can best be addressed to Congress, which, it is important to note, has remained quiet in the face of our many pronouncements on the scope of §1983." 448 U.S. at 8.

Though some cases cast doubt as to whether the words "and laws" embrace all federal statutes, *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979), the historical reasoning for confining that phrase cannot be used to confine rights secured by the Constitution itself.

[13]*Confederated Salish & Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1305 (D. Mont. 1975), aff'd on other grounds 425 U.S. 463 (1976). *Czajkowski v. Illinois*, 460 F. Supp. 1265, 1277-80 (N.D. Ill. 1977), cited by Respondents, expressly limits its holding to tax cases.

[13]Damages are normally not available under §1983 because of legislative immunity. Consequently, §1983 has not been an issue in Commerce Clause cases predating §1988. *Raymond v. Rice*, 434 U.S. 429 (1978), for instance, alleged violation of §1983, but the issue was never considered by the courts because no damages or attorneys fees were requested.

[14]Contrary to Iowa's brief, §1988 attorneys fees are not barred by the Eleventh Amendment, *Hutto v. Finney*, 437 U.S. 678 (1978).

The first distinction argued by Iowa is, of necessity, only delicately intimated. Iowa suggests that some rights are "individual liberties" and are covered by §1983, whereas others, largely property rights, are not "individual liberties." The argument was squarely rejected in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972):

> "Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel is in truth a 'personal' right. . . . " 405 U.S. at 552.

Lynch's reasoning is sound. Though we often speak of an unconstitutional burden on interstate commerce, in reality we mean an unconstitutional interference with the rights of people. "Interstate commerce" really means the right of the Chicago manufacturer to sell his goods in California, the Nebraska farmer his wheat in New York. It is that right which the Commerce Clause is designed to protect from improper state regulation. *See, Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808 (1976).[15]

Second, Iowa contends that the Commerce Clause is like the Contract Clause and that this Court has held §1983 to be inapplicable to Contract Clause cases. Iowa rests this contention upon *Carter v. Greenhow*, 114 U.S. 317

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[15]Many of the significant advances in protecting equal rights have been founded on the Commerce Clause, either as a source of legislative power, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1976); or by its own power, *Morgan v. Virginia*, 328 U.S. 373 (1946). It seems implausible that the Commerce Clause can protect these rights at its periphery, but none at its core.

(1885).[16] *Carter* has been limited as being applicable solely to tax matters. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 542 n. 6 (1972). Nonetheless, Iowa relies upon it for two points: (1) that there is no right secured by the Contract Clause and (2) that 28 U.S.C. §1343 and 42 U.S.C. §1983 are not applicable to Contract Clause cases. Both points rest upon a misconstruction of *Carter*.

In *Carter* the plaintiff sued only for a $200 money judgment for loss of his property in a tax foreclosure, arguing that the state impaired a contract by refusing to accept bond coupons for taxes. The plaintiff neither sought an injunction against the offending statute nor did he seek an award for damage to his constitutional rights. *Carter* distinguishes between the right to have a state statute impairing contracts held unconstitutional and the right to have a specific contract enforced. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 613 n. 29 (1979). The latter right is not directly secured by the Constitution.

> "In any judicial proceeding necessary to vindicate his rights under a contract, affected by such legislation [impairing contracts], the individual has a right to have a judicial determination, declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the Constitution. But of this right the plaintiff does not show that he has been deprived. He has simply chosen not to resort to it. The right to pay his taxes in coupons, and the immunity from further proceedings, in case of a rejected tender, are not rights directly secured to him by the Constitution, and only so indirectly as they happen

[16]The other case cited by Iowa in support of *Carter* is *Holt v. Indiana Mfg. Co.*, 176 U.S. 68 (1900). That tax case holds that §1983 has no application to impairments of contract, deprivation of property without due process, or equal protection. It is clearly erroneous unless confined to the tax setting, and questionable there.

> in this case to be the rights of contract which he holds under the laws of Virginia. . . ." *Carter v. Greenhow*, 114 U.S. 204 (1885).

Carter does not state that there is no individual right secured by the Contract Clause, indeed it states the opposite.

Iowa's second point about *Carter* rests upon some admittedly abstruse *dicta*. The *dicta* states that the sole basis of federal jurisdiction would be a writ of error or the Act of March 3, 1875 (the predecessor of 28 U.S.C. §1331), and not §1979, Rev. Stats. (the predecessor of 42 U.S.C. §1983). Iowa incorrectly reads this *dicta* to mean that §1983 is never applicable. The *dicta* states that §1983 is not applicable where the action is one based on contract law with the constitutional right offered as a collateral matter. That reading is supported by the case which *Carter* cites in support of its *dicta*, *The Civil Rights Cases*, 109 U.S. 3, 12-13 (1883). In *The Civil Rights Cases* the Court stated that Congress was without power to provide federal jurisdiction for the general litigation of contracts, but that it may have given jurisdiction in the predecessor of 28 U.S.C. §1331 over contracts which were impaired by state statutes in violation of the Constitution. Thus, *The Civil Rights Cases* support reading the *dicta* in *Carter* as meaning that §1331 was the only basis of federal jurisdiction over a contract case in which a constitutional right is collaterally at issue. This reading of the *dicta* in *Carter* is also supported by Justice Matthews, the author of *Carter*, who two years later summarized *Carter* as holding that there was no federal jurisdiction under §1343 and §1983 for action on the denial of a right secured by the underlying contract. *In Re Ayers*, 123 U.S. 443, 504 (1887).

Finally, Iowa contends that the Constitution may be

divided into two mutually exclusive parts. One part concerns only rights, the other part only the form of government. The Commerce Clause, Iowa says, relates solely to the form of government as an allocation of power.

The dichotomy assumed by Iowa does not exist, nor is it consonant with the philosophy or style of the Constitution.

The principal protection of individual rights under the Constitution is not the Bill of Rights. The principal protection is created by the allocation and limitation of power, both between the states and the federal government, and within the federal government. Article III and the statutes creating the federal judiciary are allocations of power. They have undoubtedly been more important in securing rights than the Bill of Rights. The requirement that revenue bills originate in the House of Representatives, which is elected every two years, is also an allocation of power. It has probably done more to secure the citizen's property rights from federal government than the Fifth Amendment. Iowa is correct when it states that many constitutional provisions allocate power, but it is wrong when it assumes that removals or grants of power have nothing to do with securing rights. Limitations on governmental power are the principal method of securing rights.

We do not suggest that all constitutional provisions secure rights, no matter how indirect the connection among the right, the constitutional provision involved, and the violation.[17] However, when a power of government is removed from the states by the Constitution for the specific purpose, among others, of preventing state legislation that

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[17]See *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979).

infringes on a recognized right, and when the state unlawfully seeks to infringe upon that right, then the state is violating a "right secured by the Constitution." That is the case here.

C. Even Were Iowa's Analysis Correct, §1983 Would Be Violated

Were any or all of Iowa's distinctions accepted as to which rights are covered by §1983, the act would apply in this case. This case falls within the well polished confines of the Fourteenth Amendment. The Fourteenth Amendment specifically prohibits depriving a person of property without due process of law. Iowa's prohibition against the operation of twin trailers in Iowa deprived Plaintiff of property.[18] Moreover, it is settled that Iowa lacked the legal power to prohibit the vehicles. *Kassel v. Consolidated Freightways*, 49 U.S.L.W. 4328 (1981). The first element of due process of law is that the person acting have the authority and jurisdiction to act.[19] Accordingly, Iowa deprived CF of property without due process of law. Thus, even were we to confine §1983 to its narrowest ambit, rights specifically contained within the Fourteenth Amendment, the statute would still apply to this case.

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[18]The plaintiff in *Kassel* had the value of its business diminished, as well as the then salable value of its federal Certificate of Convenience and Necessity issued under 49 U.S.C. §10922. *Kassel v. Consolidated Freightways*, 49 U.S.L.W. 4328, 4328 (1981).

[19]*Sterling v. Constantin*, 287 U.S. 378, 397 (1932).

IV. SOUND POLICY SUPPORTS THE APPLICATION OF 42 U.S.C. §1983 AND §1988 TO COMMERCE CLAUSE CASES.

A. THE POLICY CONSIDERATIONS BEHIND 42U.S.C. §1988 ARE STRONGLY PRESENT IN COMMERCE CLAUSE CASES.

There are four main policy reasons for awards of attorneys fees in §1983 cases:

1. To encourage the resolution of cases that present issues of broad public benefit.

2. To encourage a realistic approach to settling cases.

3. To encourage quality representation in cases involving public policy and individual rights.

4. To prevent loss of rights because of an inability to obtain qualified lawyers to defend them.

Three of these factors are strongly present in nearly all Commerce Clause cases. The last is present in some. First, Commerce Clause cases involve significant conflict between the broad public interest and the interest of one state. Second, they are rarely resolved short of trial because settlement is politically difficult for the state. Third, they are complex and expensive to prepare and prove, particularly when safety is involved. Fourth, there may be cases of substantial merit but of insufficient benefit to any individual party to justify his undertaking the representation of all.

In *Kassel*, as in many Commerce Clause cases, the public

won. Motorists and truckers will have fewer accidents. Taxpayers will pay for less roadwear. Less diesel fuel will be used. Consumers will pay less for goods because of a reduction in shipping costs. *Consolidated Freightways v. Kassel*, 475 F. Supp. 544, 550 (1979).

Had Iowa prevailed, all these advantages would have been lost. Iowa's politicians behaved properly within their narrow political framework, but that is precisely the point. Iowa's viewpoint was too narrow, its constituency too small, for it to perceive the broader advantages. States will not normally view the overall result, but only the result within the particular state. This predictable state myopia is what caused the economic chaos that quickly developed under the Articles of Confederation. Attorneys fees awards will encourage representation that will benefit the public.[20]

Unfortunately, the same political pressures that encourage burdensome and discriminatory state regulation cause continued litigation rather than settlement of Commerce Clause disputes. As with Governor Wallace in the school house door, it is to the local politician's advantage to force the federal courts to order what should be done, rather than accepting the political criticism that results from taking the proper course voluntarily. Legislative immunity from damages encourages that stance. Allowing attorneys fees under §1988 in Commerce Clause cases would encourage settling matters whose end result can be reasonably anticipated.

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[20]To meet the test enunciated in *Raymond v. Rice*, 434 U.S. 429 (1978), the overall benefits must outweigh the detriment. In almost every significant Commerce Clause case decided by this Court, a group of immediate beneficiaries beyond plaintiff can easily be identified, and a still larger group of secondary beneficiaries can also be identified.

Iowa, in its brief, contends that attorneys fees should be denied because they may be a substantial drain on the state's budget.[21] Such awards, Iowa says, may "punish" the state for enacting statutes found to be unconstitutional. Though not cast in those pejoratives, that was certainly one of the purposes intended by Congress. As this Court stated in regard to §1983 damages:

> "Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. . . . To criticize section 1983 liability because it leads decisionmakers to avoid the infringement of constitutional rights is to criticize one of the statute's raisons d'être." *Owen v. City of Independence*, 445 U.S. 622, 656 (1980). [Footnote omitted]

This Court has also stated that ordering fees to be paid from the public treasury is a proper application of §1983 and §1988. *Owen, supra*, at 655. Although legal fees may not bar a large corporate plaintiff from asserting these complex issues, the high cost of litigating these cases makes the attorney fees a factor for even the largest corporations.

It is perhaps equally important to note what awards of attorneys fees will not do. There will be no substantial

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[21]Iowa is miscast as Cassandra in this instance. Iowa's own analysis found that it will obtain more revenues from taxes on twin trailers than it will suffer costs. *Consolidated Freightways v. Kassel*, 475 F. Supp. 544, 550 (1979); "Sixty-Five Foot Twin Trailers On Iowa Highways" (Iowa DOT, 1975), Appendix at 580, 596-97, *Kassel v. Consolidated Freightways*, 49 U.S.L.W. 4328 (1981). The excess revenues are far greater than any award of fees would be.

increase in Commerce Clause litigation. Because of the high cost of litigating these matters, cases without substantial merit will not be filed, as fees are only awarded upon success. The pressures toward settlement are likely to offset any increase in the number of Commerce Clause cases filed if §1988 is held to apply. Only attorneys and expert witnesses will suffer losses from settlement.

B. If This Court Holds That §1983 Does Not Apply To Commerce Clause Rights, It Will Jeopardize Firmly Established Concepts Of Standing, Statutory Interpretation, And Individual Access To The National Economic System.

Consider the effect on the law if the Court determines there was no constitutional right to engage in interstate commerce covered by §1983. First, the Court would have to overrule the many previous cases which state that there is a right, secured by the Constitution, to engage in interstate commerce. Second, the Court would make the plaintiff's position in Commerce Clause cases unusual. The plaintiff would simply be there at his own expense to trigger the litigation, as Iowa would put it, of the allocation of governmental powers. The plaintiff's own interests would be ancillary. Third, the Court would be ruling against the plain wording of §1983, which Congress has not chosen to limit. Finally, and perhaps most importantly, the Court would destroy the fundamental right of individual access to a national economy. It would, in essence, say that a savings account is protected under §1983, see *Lynch*, *supra*, but the means of creating and enlarging

that savings account are not. Such a determination would fail to address the reality of the specialized, integrated, economic system we now have in America.

CONCLUSION

This Court has the power to decide the principal underlying legal issues in this matter. It should not exercise that power.

The underlying legal issues here are important, but this case reaches the Court in an awkward posture. There are no decisions below that can aid the Court. The parties are unable to agree on the issues or present focused briefs and arguments.

Moreover, this case presents an important procedural issue. If Courts of Appeals are to initially grant or deny attorneys fees, this Court should require statements of reasons to permit review. If attorneys fees under §1988 should normally be first determined by the District Courts with appeal as of right to the Courts of Appeals, this Court should so state.

Petitioner respectfully requests that this Court reverse the decision below for failure to state reasons and remand to the Circuit Court with instructions to remand to the District Court. Should this Court decide to determine the underlying issues, Petitioner requests that this Court hold

§1988 to be applicable for the reasons stated. This Court should then remand to the Eighth Circuit with instructions to remand to the District Court to determine the amount of fees or if special circumstances exist warranting denial of fees.

Respectfully submitted,

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